SUPREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, ...

No. 78-565

RICHARD D. RISLEY,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION

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OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported as *Risley* v. *State*, 279 So.2d 154 (Miss. 1973). Rehearing was denied on June 29, 1973. A copy of the opinion is attached hereto as Appendix A.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of a Petition for Writ of Certiorari through the authority of 28 U.S.C., Section 1257(3). Jurisdiction is improperly invoked under said authority as is hereinafter set forth in Respondent's argument.

QUESTIONS PRESENTED

As hereinafter set forth, the Constitutional issue presented is not properly before this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner seeks to invoke the provision of the Constitution of the United States, Amendment XIV, Section I, however, as hereinafter set forth, said provision is not properly before this Court.

STATEMENT OF THE CASE

On October 5, 1972, in the Circuit Court of Jackson County, Mississippi, Petitioner, Richard D. Risley, and his brother, Roger J. Risley, were jointly indicted for the robbery of Mrs. Dianna Davis. After trial by jury, Petitioner alone was convicted and sentenced to serve a term of twelve (12) years in the Mississippi State Penitentiary.

During the course of the trial the prosecution presented the testimony of the victim of the robbery and the only eyewitness, Mrs. Davis. When the prosecutor asked Mrs. Davis if she saw her robber in the courtroom, Petitioner moved for, and was granted, an evidentiary hearing on the question of whether Mrs. Davis' identification testimony would be tainted. Outside the presence of the jury Mrs. Davis positively identified Petitioner as the robber, and Petitioner was given wide latitude and extensively cross-examined her concerning said identification and the facts surrounding a pre-trial lineup at which Mrs. Davis also identified the Petitioner.

At the conclusion of Mrs. Davis' testimony, during the evidentiary hearing, Petitioner requested to call only one witness, an Officer Mathis, who was apparently present during the lineup proceeding. The trial judge stated that he would not allow two trials, but would allow Petitioner to question Officer Mathis concerning his knowledge of Mrs. Davis' identification of Petitioner at the pre-trial lineup. For reasons known only to Petitioner and his counsel, Officer Mathis was not called as a witness, and no other request was made to call any other witnesses.

Later, when Officer Mathis was called as a witness for the State, on its case in chief, Petitioner cross-examined him about other matters, but did not question him concerning the lineup nor request that he be heard outside the presence of the jury on this matter. At no time did Petitioner make a proffer of what Mathis' testimony would be.

At no point in the trial court did Petitioner raise the issue that he was denied a right, either under the federal or state Constitution, or otherwise, to call witnesses in his behalf during an evidentiary hearing concerning eyewitness identification. On appeal to the Mississippi Supreme Court, Petitioner assigned as error, inter alia, that, "the Court erred in refusing appellant the right to call witnesses during exclusionary hearing on eyewitness' identification." Petitioner's briefs and argument in the State Supreme Court did not present the federal constitutional issue here relied upon, and the Court's opinion did not rely upon federal or state constitutional grounds.

ARGUMENT

It is well established that this Court will not decide federal constitutional issues raised here for the first time. *Cardinale* v. *Louisiana*, 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1162 (1969).

It is also well established that it will be assumed that where the highest state court has failed to pass upon a federal question, the omission was due to want of proper presentation in the state courts, and the burden of showing otherwise is on the aggrieved party. *Street* v. *New York*, 394 U.S. 576, 22 L.Ed.2d 572, 89 S.Ct. 1354 (1969).

It is the position of the State of Mississippi that Petitioner's sole federal question presented by his petition has never been raised, preserved or passed upon in any of the courts of the State. However, even if it could be argued that the question was presented in the State Supreme Court, that court's opinion failed to pass on it because it was not properly preserved in the lower trial court.

In *Henry* v. *Mississippi*, 379 U.S. 443, 447, 13 L.Ed.2d 408, 85 S.Ct. 564 (1965) the court stated:

> These cases settle the proposition that a litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest.

The Court in *Henry* recognized that Mississippi's contemporaneous objection rule served a legitimate state interest. By analogy, Mr. Justice White concurring in *Chambers* v. *Mississippi*, ... U.S. ....., 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), was of the opinion that the same rule

obtains in Mississippi where the proponent of evidence claims error in its exclusion, and that rule is that in order to preserve the alleged wrongful exclusion for appeal, it is necessary for the proponent to make an offer of proof of the evidence or testimony excluded. SEE: *Newell* v. *State*, 209 Miss. 653, 48 So.2d 332 (1950); *Hitt* v. *State*, 217 Miss. 61, 63 So.2d 665 (1953); *Freeman* v. *State*, 204 So.2d 842 (Miss. 1967); and *Priest* v. *State*, 275 So.2d 79 (Miss. 1973).

In the absence of a showing to the contrary, it must be assumed that the Mississippi Supreme Court's refusal to pass upon the federal question was due to a lack of proper presentation in the state courts, and since the court's ruling was grounded on a procedural rule that serves a legitimate state interest we respectfully submit that this Court should not now consider the federal question before it.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

A. F. SUMMER, Attorney General

By: TIMMIE HANCOCK
Special Assistant Attorney General

and

By: WAYNE SNUGGS
Special Assistant Attorney General
Of Counsel

CERTIFICATE

I, Wayne Snuggs, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a copy of the foregoing Brief for Respondent in Opposition to Alfred Lee Felder, P. O. Box 1645, Pascagoula, Mississippi.

This, the 18th day of December, A. D., 1973.

.....

Special Assistant Attorney General

APPENDIX A

IN THE SUPREME COURT OF MISSISSIPPI

No. 47,402

RICHARD D. RISLEY

v.

STATE OF MISSISSIPPI

RODGERS, PRESIDING JUSTICE.

The appellant Richard D. Risley and Roger J. Risley were jointly indicted in the Circuit Court of Jackson County, Mississippi for the alleged robbery of Mrs. Dianna Davis. Roger Risley was acquitted, but the jury found the appellant, Richard D. Risley, guilty. He was sentenced to serve a term of twelve (12) years in the state penitentiary. After his motion for a new trial was overruled, he has appealed to this Court and now contends that the trial court erroneously denied the appellant the right to call witnesses during the preliminary hearing on appellant's motion, offered in the absence of the jury, on the issue as to whether or not the eyewitness identification was tainted by suggestive procedures to such an extent that its introduction would deny the defendant due process.

Appellant also complains that the trial court erred in permitting an officer to testify that Roger Risley said his brother ran out of the house and said: " 'Get the hell out of here.' What would you do if this remark was addressed to you?"

The appellant argues that he was entitled to call witnesses to show that the eyewitness identification testimony should not be admitted because it was wrongfully

obtained. He cites *United States* v. *Allison,* 414 F. 2d 407 (9th Cir. 1969), a California case, with reference to pre-trial photographic identification, in such a manner so as to taint in-court identification. The *Allison* case cites *Simmons* v. *United States,* 390 U. S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968) in which the United States Supreme Court laid down the rule that each pre-trial hearing on a motion to exclude must be considered on its own facts, and if within the light of the totality of the circumstances surrounding the case, the identification procedure by use of photographs is not such as to deny due process of law, the testimony is admissible. In *Foster* v. *California,* 394 U. S. 440, 89 S. Ct. 1127, 22 L. Ed. 2d 402 (1969), the United States Supreme Court gave an example of prejudicial identification. In that case the suspect was a tall man, and he was lined up with short men for identification purposes. When the eyewitness could not identify him, they brought the defendant into a room so that the witness could speak to him. Still, the witness was not sure. Ten days later the prisoner was again exhibited in a lineup, and this time the witness was convinced that the prisoner was the robber. The Court held that the continued effort to get the witness to identify the prisoner "as the man" was sufficient to undermine the reliability of the identification so as to violate due process.

In the instant case, the appellant did not advise the court of any evidence that he had that would dilute the eyewitness identification of the prisoner. The witness whom he wanted to call was later introduced and cross-examined by the appellant, but no evidence was adduced by any witness during the trial to dilute the identification of the defendant made by the victim.

The appellant contends that the statement made by Roger Risley with reference to what his brother said at the time he made a telephone call was made as a result of

questions propounded to him by the officers after he had told them that he desired to remain silent. If this evidence were inadmissible for other reasons, they were not made known in the trial court. The testimony was not objectionable for the reason given because the record shows that the statement was made voluntarily at a time when the witness was not being interrogated.

We think that the testimony was sufficient to establish the appellant's guilt, and since there is no reversible error in the record, the judgment of the trial court must be affirmed.

AFFIRMED.

PATTERSON, INZER, ROBERTSON and WALKER, JJ.,

CONCUR.